[APPELLATE CIVIL JURISDICTION]
MURRAY-AYNESLEY, J.
September 26, 1938.

HAJI OSMAN BIN HAJI SEDIK

v.

NG AH SIEW.

[PERAK CIVIL APPEAL No. 28 of 1938]

Civil Procedure Code, s. 283 (1) (c)— "agriculturist."

The appellant was the owner of about 25 or 30 acres of land of which about 14 acres were charged in favour of and were in the occupation of the respondent. The remaining 10 acres or so were planted in coconuts and rubber by the appellant with the assistance of members of his family and occasional hired labour. The appellant did not appear to have any other form of livelihood.

Held, that the appellant was an "agriculturist" within the meaning of section 283 (1) (c) of the Civil Procedure Code.

S. V. R. Y. Somasundaram Chettiar v. *Ong Yeo Seng & ors.*, (1931—1932) F.M.S.L.R. 295; (1932) 1 M.L.J. 113 referred to.

MAGISTRATE'S CIVIL APPEAL.

M. S. Mahendran for the Appellant.

John L. Woods for the Respondent.

Cur. Ad. Vult.

MURRAY-AYNESLEY—This Appeal raises a short point on the interpretation of section 283 (1) (c) of the Civil Procedure Code namely whether the Appellant is an Agriculturist within the meaning of that sub-section. It appears that the Appellant owns about 25 or 30 acres of land, of this about 14 acres have been charged to the Respondent and are in the occupation of the latter. The remaining 10 acres or so are planted in coconuts and rubber by the Appellant with the assistance of members of his family and occasional hired labour. It does not appear that the Appellant has any other form of livelihood. The question is whether the Appellant can in these circumstances be described as an agriculturist.

In ordinary English language there is nothing which could restrict the meaning of the word to the smaller forms of rural exploitation, in fact rather the contrary. Indian Courts on the legislation of which country local provision is based, have adopted a special meaning in interpreting the corresponding Indian provision limiting its application to the small peasant cultivation of that country, described under the generic term of ryot.

In the Judgment of Burton, J. in the Johore case (1931—2 F.M.S.L.R. p. 295) a restrictive meaning is based on the use of the word agriculturist coupled with artisan in para, (6) of the same subsection. I regard this type of interpretation as speculative and dangerous where the legislature has used a word of general meaning. Its unsatisfactory character is shown by the fact that Burton J. seemed to consider that a person might cease to be an agriculturist as the price of rubber rose and *vice versa*.

The so-called principle of *noscitur a sociis* like the *ejusdem generis* rule is now out of favour.

However in the present case even if a restricted meaning were to be adopted, I do not consider that a person with a holding like the present one would cease to be *ejusdem generis* with an artisan.

Many artisans employ hired labour and provided that a person is what would be called in some parts of England a "working farmer" the fact that he depends to a certain extent on hired labour would not prevent him from being an agriculturist even if the meaning of that word be restricted as has been done in India and by Burton J. and Whitley J. in the Johore case.

It was conceded by Mr. Woods for the Respondent that this case is not affected by the fact that this is an attachment before Judgment.

The appeal must be allowed with costs.

Appeal allowed.

KEDAH REPORT.

[APPELLATE CIVIL JURISDICTION]
McELWAINE C.J., (S.S.), HALL C.J., (F.M.S.) AND HOWES, J.
March 13, 1938.

THE ESTATE AND TRUST AGENCIES (1927) LIMITED.....Plaintiffs (Respondents)

Vs.

1. CHANG KIAM HOE ALIAS THIO NGHEAN LEONG
2. THONG SIEW MEE (f) THE ADMINISTRATRIX OF THE ESTATE OF TAN TAY PO ALIAS CHIN KIM PO ALIAS CHAN KAM PO
3. CHEW TUNG SENG

} Defendants.

4. A. M. NACHIAPPA CHETTY
5. LIM SAW KEAT NEOH

} Appellants

[KEDAH CIVIL APPEAL No. 2 of 1356]

Practice—withdrawal of appeal—revocation of withdrawal.

After an appeal had been set down for hearing, the appellants were advised not to proceed with it but to commence a new suit claiming certain reliefs. The appel-

lants were therefore desirous of withdrawing the appeal. The respondents agreed that the appeal should be withdrawn on payment of costs. The appeal was accordingly removed from the list. It was then discovered that the contemplated suit could not be brought and that the procedure by appeal was the proper procedure. The Appellants applied to the Judge of the First Division to be allowed to appeal out of time. The Judge disallowed the application being of the opinion that he had no power to make the order.

Held, on appeal to the Court of Appeal, that in the circumstances of the present case the Judge of the First Division had jurisdiction to give leave to file a fresh appeal out of time in place of the appeal which had been withdrawn and not dismissed but that leave should only be granted on terms.

CIVIL APPEAL.

de Buriatte for the Appellants.

Ong Huck Lim for the Respondents.

Cur. Ad. Vult.

The judgment of the Court of Appeal (**McELWAINE C·J·, S.S., HALL C.J., F.M.S.** and **HOWES. J.**) was as follows.—

The Appellants obtained judgments in the Courts of the Straits Settlements against Chang Kiam Hoe alias Thio Nghean Leong, and these judgments were registered in the High Court of Kedah. The Appellants attached certain lands in which the said Chang Kiam Hoe alias Thio Nghean Leong appeared to have a beneficial interest. Various proceedings were taken in the Kedah Courts to decide whether or not the land belonged to the estate of one Thio Tiauw Siat deceased.

An action was brought by the Estate and Trust Agencies Limited as Receivers of the Estate of the said Thio Tiauw Siat against the five defendants for a declaration that the lands attached belonged to the estate of Thio Tiauw Siat deceased and for an order that the seizure made by the 4th and 5th defendants be removed.

The learned Judge of the Second Division made these orders.

The 4th and 5th defendants lodged an appeal to the Judge of the First Division. This appeal was lodged in time.

After the appeal had been set down for hearing, the present appellants were advised that their proper course was not to appeal against the orders of the Judge of the Second Division but to commence a new suit for a declaration that the defendant Chang Kiam Hoe alias Thio Nghean Leong is still the owner of the seized land.

The 4th and 5th Appellants therefore desired to withdraw the appeal. The plaintiff agreed that the appeal should be withdrawn on payment of certain costs. The appeal was therefore taken out of the list.

It was then discovered that the new contemplated suit could not be brought and that the procedure by appeal was the proper procedure.

The present Appellants applied to the Judge of the First Division to be allowed to appeal out of time.

This application he refused being of opinion that he had no power to make such an order. The learned Judge appears to have considered *In Re Lamb*, 23 Q.B.D. 477 in point. But this was a case in which an appeal had been dismissed by the Court on the non-appearance of the appellant. It was a case of *res judicata*. The present case was taken out of the list. It was not called on before the Judge because it was already withdrawn. The Judge of the First Division had not dismissed it.

We have had the advantage of considering *Watson* v. *Cave* 17 Ch. D. 23 which was not cited before the learned Judge of the First Division.

From that case it appears that when an appeal has been withdrawn by mistake of fact, if the appellant afterwards wished to withdraw from his withdrawal and return to his former position, his proper course was to apply for leave to give fresh notice of appeal.

That decision is applicable in the present case, and we are of opinion that the learned Judge of the First Division had jurisdiction to give leave to file a fresh appeal out of time in place of the appeal which had been withdrawn and not dismissed.

We think this a proper case in which leave to appeal out of time should be granted on terms.

Those terms are that the costs paid to the Respondents shall not be affected by whatever may be the result of the appeal which we now give leave to file. That the costs of the present appeal be in no case paid by the Respondents, but should the appeal be dismissed the Respondents to have their taxed costs of to-day's appeal.

On these terms we give leave to appeal out of time against the decision of the learned Judge of the Second Division, and for this purpose extend the time for appealing to 31st March, 1938.

Appeal allowed.